IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00981-CMA-MEH

HEIDI GILBERT,
AMBER MEANS,
MANDY MELOON,
GABRIELA JOSLIN,
KAY POE, and
JANE DOES 6-50,

Plaintiffs,

v.

UNITED STATES OLYMPIC COMMITTEE,
USA TAEKWONDO, INC.,
U.S. CENTER FOR SAFESPORT,
STEVEN LOPEZ,
JEAN LOPEZ, and
JOHN DOES 1-5,

Defendants.

USA TAEKWONDO, INC.'S OBJECTION TO MAGISTRATE'S RECOMMENDATIONS [D.E. 218] PURSUANT TO FED.R.CIV.P. 72(b)(2)

Defendant USA Taekwondo, Inc. ("USAT"), through its attorneys, hereby submits its Objection to the March 6, 2019, Recommendation of United States Magistrate Judge ("Recommendation") [D.E. 218], pursuant to Fed.R.Civ.P. 72(b)(2), as follows:

I. INTRODUCTION

USAT respectfully objects to the Magistrate's recommendation that the Forced Labor claims asserted by two of the named Plaintiffs in this action should survive

USAT's motion to dismiss and that the Obstruction claim asserted by all Plaintiffs' should survive. The Forced Labor claims asserted by Gaby Joslin and Amber Means (Counts 4 and 9) should be dismissed because they cannot establish a nexus between USAT's actions and injuries they allegedly suffered while victims in an alleged venture that ended, with respect to them, no later than 2011. The Obstruction claim (Count 14) asserted by all Plaintiffs should be dismissed because Plaintiffs have not adequately alleged an object of USAT's alleged obstruction.

II. BACKGROUND

USAT moved to dismiss each Count of Plaintiff's Second Amended Complaint [D.E. 68] ("SAC") against it with prejudice on September 24, 2018, including Counts 4-7, 9, 11-12, and 14-20. *See generally* USAT's Motion to Dismiss Second Amended Class Action Complaint ("Motion") (Sept. 24, 2018) [D.E. 109].[1] In response, Plaintiffs acceded to dismissal of Counts 6-7 (Sex Trafficking of Children and Benefitting from a Venture that Sex Traffics Children claims asserted against USAT by Plaintiff Gaby Joslin), 11-12 (Sex Trafficking of Children and Benefitting from a Venture that Sex Traffics Children claims asserted against USAT by Plaintiff Amber Means), and 18 (Defamation Claim against USAT asserted by all Plaintiffs). *See* Plaintiffs' Amended Omnibus Response to Motions to Dismiss ("Response" or "Resp.") (Nov. 1, 2018) [D.E. 139] at 3; *see also* SAC [D.E. 68] at Counts 6-7, 11-12, and 18. As a result, the only claims against USAT remaining for consideration by the Magistrate included Counts 4-5

[1] USAT incorporated and adopted the arguments set forth by the United States Olympic Committee in both its Motion and in its Reply in Support of Motion to Dismiss. *See* ECF. No. 109 at n. 1; D.E. 158 at n. 1.

(Plaintiff Gaby Joslin's claims for Forced Labor and Trafficking with Respect to Forced Labor), 9 (Plaintiff Amber Means' claim for Forced Labor), 14-17 (all Plaintiffs' Obstruction, RICO, Negligent Supervision, and Negligent Retention claims), and 19-20 (all Plaintiffs' Negligence and Gross Negligence claims). *See* SAC [D.E. 68] at Counts 4-5, 9, 14-17, and 19-20.

The Magistrate issued his Recommendations on March 6, 2019. D.E. 218. In doing so, the Magistrate has recommended dismissal of Counts 5, 15-17, and 19-20 against USAT. *See* Recommendation [D.E. 218] at 71-72. USAT does not object to these recommendations. However, the Magistrate has recommended that Counts 4, 9, and 14 from Plaintiffs' SAC should survive dismissal. *Id*. at 71. Count 4 consists of Plaintiff Gaby Joslin's claim against USAT for Forced Labor in Violation of 18 U.S.C. §§ 1589(b) and 1595(a), Count 9 consists of Plaintiff Amber Means' claim against USAT for Forced Labor in Violation of 18 U.S.C. §§ 1589(b) and 1595(a); and Count 14 consists of all Plaintiffs' claim against USAT for Obstruction, Attempted Obstruction, Interference with Enforcement in Violation of 18 U.S.C. §§ 1590(b), 1591(d), 1595(a), and 2255. *See* SAC [D.E. 68]. USAT respectfully objects to the Magistrate's recommendation that Counts 4, 9, and 14 should survive against USAT.

III. ARGUMENT

A district court judge must review *de novo* any properly objected to portion of a magistrate's recommendations on a dispositive motion. *See* Fed.R.Civ.P. 72(b)(3). Under that standard, USAT respectfully suggests that this Court should accept the Magistrate's Recommendations and dismiss with prejudice Counts 5, 15-17, and 19-20

of Plaintiffs' SAC, but that it should reject the Recommendations with respect to Counts 4, 9, and 14. Those Counts should be dismissed.

A. Plaintiffs Gaby Joslin's and Amber Means' Claims for Forced Labor Pursuant to 18 U.S.C. §§ 1589(b) and 1595(a) (Counts 4 and 9) Must Be Dismissed for Lack of Standing.

There is no nexus between USAT's alleged violation of 18 U.S.C. § 1589(b) and the damages alleged under Plaintiffs' forced labor claims. Ms. Joslin and Ms. Means therefore lack standing to pursue those claims against USAT.[2]

According to the Recommendations, the elements of a claim for forced labor include knowingly participating in a venture, knowingly benefitting from a venture, and knowingly or recklessly disregarding the fact that the venture has engaged in providing or obtaining forced labor or services. D.E. 218 at 24-25, 29.[3] In rejecting USAT's arguments in favor of dismissal, the Magistrate states that USAT does not dispute that it knowingly benefitted from its relationship with Steven Lopez and that he competed for USAT in the 2016 Olympics and in the 2017 World Championships, which were "well within the period that the claim is available." D.E. at 30. With respect to the requirement that USAT must have knowingly or recklessly disregarding "that Steven [Lopez] had obtained the services of Plaintiffs before it benefitted from the venture in 2016," the Magistrate points to Plaintiffs' allegation that USAT began investigating the Lopez brothers in 2014 and hired an investigator in March 2015 to focus on the Lopez

[2] No class has been certified. Ms. Joslin and Ms. Means therefore are pursuing only their own, individual claims at this time.

[3] The Magistrate's discussions of Counts 4 and 9 are, in relevant part, substantively identical. *Compare* D.E. 218 at 29-31 to *id*. at 38-39.

brothers," which was prior to Steven Lopez's participation in competitions during 2016 and 2017. *Id*. at 31. Though the Magistrate concedes that USAT did not gain knowledge that Steven Lopez obtained sexual services until well after his conduct occurred, the Recommendations then state that this "does not protect USAT from the reach of the TVPA" because the statute does not require that whoever knowingly benefits from a venture have knowledge shortly after the alleged abuse occurs, or even of the specific victim of the abuse. *Id*.

USAT objects to the Magistrate's Recommendations on this issue because they fail to distinguish between a *criminal* violation of 18 U.S.C. § 1589(b), and a *civil* claim for violation of § 1589(b) brought pursuant to § 1595(a). Indeed, a criminal violation of § 1589(b) does not appear to require knowledge of any particular victim and does not require that knowledge be gained at any particular point in time, so long as the perpetrator knowingly benefits from the venture at issue. *See generally* 18 U.S.C. § 1589(b). Notably, however, § 1589 provides for criminal penalties and does not, in and of itself, allow for victims to collect compensatory damages. *Id*. In contrast, § 1595(a) provides that the *victim* of a violation of § 1589 may bring a civil action against the perpetrator or whoever knowingly benefits from the venture in an appropriate district court and that the victim may recover damages. *See* 18 U.S.C. § 1595. Plaintiffs' civil claim for a violation of § 1589 is only viable if authorized by § 1595. Under the circumstances, it is not.

Again, § 1595 authorizes the *victim* of a violation of § 1589 to bring a civil action for damages. Here, the Recommendations note that both Ms. Joslin and Ms. Means

are *former* members of USAT and that they both had stopped competing in taekwondo, at the latest, in approximately 2011. D.E. 218 at 59-60. Thus, by the time USAT allegedly learned of Steven Lopez's venture in 2014 or 2015 and by the time USAT allegedly knowingly benefitted from the venture in 2016 and 2017, Ms. Joslin and Ms. Means no longer were victims in the alleged venture. In other words, USAT did not and could not have knowingly benefitted from forced labor of Ms. Joslin or Ms. Means in 2016 and 2017, because neither was even allegedly being subjected to forced labor at that point in time. As a result, neither Ms. Joslin nor Ms. Means can establish any nexus between their alleged injuries (*i.e.*, those tied to the damages available to victims under § 1595) and USAT's purported knowledge and participation under § 1589. It is axiomatic that there must be some connection between a defendant's conduct and the plaintiff's injuries in order to hold the defendant liable for those injuries in the context of a civil claim. Indeed, to have Article III standing, the plaintiff must have suffered or be imminently threatened with a concrete and particularized ***injury in fact that is fairly traceable to the challenged action of the defendant*** and likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The Forced Labor claims asserted by Ms. Joslin and Ms. Means (Counts 4 and 9) should be dismissed because they cannot trace their alleged injuries to USAT's knowledge of, or participation in, the alleged venture.

B. Plaintiffs' Claim for Obstruction, Attempted Obstruction, Interference with Enforcement in Violation of 18 U.S.C. §§ 1590(b), 1591(d), 1595(a), and 2255 (Count 14) Must Be Dismissed.

Count 14 of the SAC attempts to assert a civil claim against USAT for obstruction as defined by 18 U.S.C. §§ 1590(b) and 1591(d). *See* SAC [D.E. 68] at Count 14. The Magistrate concludes that allegedly false testimony given to Congress by USAT's Executive Director Steve McNally is sufficient for Plaintiffs to state an obstruction claim upon which relief can be granted under these statutes. This is so, according to the Magistrate, because "Congress is a government actor, and false statements to obstruct an investigation plausibly allege a § 1590(b) violation." Recommendation [D.E. 218] at 42. USAT respectfully objects to this portion of the Magistrate's Recommendation. It is not enough for Plaintiffs to allege that USAT lied to Congress and for the Magistrate to therefore conclude that Plaintiffs' claim for obstruction is viable simply because Congress is a government actor. Plaintiffs must also plausibly allege a connection between Mr. McNally's allegedly false testimony to Congress, on one hand, and enforcement of 18 U.S.C. §§ 1590 and 1591, on the other. They have not done so.

USAT's objection is supported by the plain language of the statutes at issue, which are nearly identical. 18 U.S.C. § 1590(b) states: "Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the **enforcement** of this section, shall be subject to the penalties under subsection (a)." (Emphasis added). 18 U.S.C. § 1591(d) similarly states: "Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the **enforcement** of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both." (Emphasis added).

Plaintiffs, however, do not allege that Congress was attempting to ***enforce*** either § 1590 (making trafficking with respect to forced labor a crime) or § 1591 (making sex trafficking of children a crime) during the hearing at which Mr. McNally testified. The key word in both statutes is "enforcement," as both require obstruction or interference with enforcement in order for a violation to occur.

The plain language of §§ 1590(b) or 1591(d) is consistent with case law holding that obstruction must have an "object." In In *Marinello v. United States*, 138 S. Ct. 1101 (2018), for example, the Court ultimately counseled against a broad reading of 26 U.S.C. § 7212(a), which is found within the Internal Revenue Code, and which makes it a felony to, in relevant part, "corruptly or by force or **Error! Hyperlink reference not valid.** (including any threatening letter or communication) endeavor[] to intimidate or impede... the due administration of [the Internal Revenue Code]." The *Marinello* court examined the language of § 7212(a) as follows:

> As to Congress' intent, the literal language of the statute is neutral. The statutory words "obstruct or impede" are broad. They can refer to anything that "block[s]," "make[s] difficult," or "hinder[s]]."[…] *But the verbs "obstruct" and "impede" suggest an object—the taxpayer must hinder a particular person or thing*.

Marinello, 138 S. Ct. at 1106 (emphasis supplied, dictionary citations omitted). Put another way, there must be "an actual, not a theoretical obstruction." *Vaughn v. Flint*, 752 F.2d 1160, 1168 (6th Cir. 1985) (interpreting the elements of a contempt violation under 18 U.S.C. § 401(1)).

In this case, the Magistrate's conclusion that Congress is a government actor and that the allegedly false statements by USAT to Congress plausibly allege an

obstruction claim under §§ 1590(b) or 1591(d) is incorrect because the Congressional hearing at issue in this case had nothing to do with enforcement of 18 U.S.C. §§ 1590 or 1591. Indeed, Plaintiffs do not allege in the SAC that the hearing during which USAT purportedly lied to Congress was called for the purpose of enforcing either §§ 1590 or 1591. To the contrary, Plaintiffs allege that "USAT intentionally lied to Congress in order to stop Congress from implementing further reforms." SAC at ¶ 221. The lack of any allegation that Congress was involved in the task of enforcing §§ 1590 or 1591 is not surprising in light of the fundamental principal of separation of powers:

> While the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has cautioned that the power to investigate may be exercised only "in aid of the legislative function" and cannot be used to expose for the sake of exposure alone. The *Watkins* Court underlined these limitations, stating that "t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress ... ***nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government.*** No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress."

ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT MANUAL 25 (2014), citing *Watkins v. United States*, 354 U.S. 178, 187 (1957) (emphasis added).

In short, there is nothing in the record to suggest that Congress was ***enforcing*** existing trafficking and forced labor laws when it held the hearing during which USAT allegedly lied. For this reason, USAT respectfully objects to the Magistrate's recommendation that Plaintiffs' allegations regarding Congressional testimony are sufficient to support their obstruction claim against USAT. Count 14 should be dismissed.

Consistent with the plain language of the statutes and the requirement that obstruction must have an object, case law from the Supreme Court indicates that the obstruction statutes alleged by Plaintiffs in this case should also require a nexus between the allegedly obstructive act and the government proceeding. This requirement derives from the breadth of 18 U.S.C. §§ 1590(b) and 1591(d).

The *Marinello* Court held that 26 U.S.C. § 7212(a) requires the Government to show a nexus "between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. That nexus requires a relationship in time, causation, or logic with the proceeding." *Marinello*, 138 S. Ct. at 1105, 1109 (quotations and bracketed language omitted). The court drew heavily from *United States* v. *Aguilar*, 515 U. S. 593 (1995), which involved interpretation of a “similarly worded criminal statute,” 18 U.S.C. §1503(a), which makes it a felony to “corruptly or by threats or force, or by any threatening letter or communication, [to] influenc[e], obstruc[t], or imped[e], or endeavo[r] to influence, obstruct, or impede, the due administration of justice.” *Marinello*, 138 S. Ct. at 1105-06 (punctuation in original).

The *Aguilar* court concluded that false statements made to an investigating agent did not support a conviction for obstruction of justice under 18 U.S.C. §1503(a) because the government failed to show a nexus between the false statement made to the agent and any intention by the defendant to thwart a grand jury investigation. *Aguilar*, 515 U.S. at 600-601. The *Aguilar* court additionally remarked that the nexus was absent because

"it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority."

The Supreme Court reached a similar conclusion in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). The *Arthur Andersen LLP* court analyzed the language of 18 U.S.C. §§ 1512(b)(2)(A) and (B), which provides that, "[w]hoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause or induce any person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than ten years, or both"). *Arthur Andersen LLP*, 544 U.S. at 703. The *Arthur Andersen LLP* court held that the jury instructions for witness tampering were infirm because "[t]hey led the jury to believe that it did not have to find *any* nexus between the 'persuasion' to destroy documents and any particular proceeding." *Id*. at 708.

In this case, the obstruction statutes at issue are even broader than those considered by the Supreme Court in *Aguilar*, *Arthur Andersen LLP*, and *Marinello (*18 U.S.C. §§ 1503, 1512 and 26 U.S.C. § 7212(a), respectively). 18 U.S.C. §§ 1590(b) and 1591(d) provide no further information about what constitutes a violation beyond "obstruct[ion], attempt[] to obstruct, or in any way interfere[]" with enforcement of §§ 1590 and 1591. The Magistrate correctly concluded that a government actor must be involved in order to state a claim for obstruction, but should have gone a step further to

determine what must be alleged in terms of the government actor. Specifically, Plaintiffs should have to show a nexus between USAT's conduct and a particular enforcement proceeding requiring a relationship in time, causation, or logic with that proceeding. In order to state a claim under 18 U.S.C. §§ 1590(b) or 1591(d), Plaintiffs would have claim that the alleged lie to Congress is connected to an intention by USAT to thwart a government effort to enforce 18 U.S.C. §§ 1590 or 1591. They have not and cannot articulate such a claim.

To require less than a nexus between a defendant's conduct and a government proceeding would render 18 U.S.C. §§ 1590(b) and 1591(d) unconstitutionally vague. Both are first and foremost criminal statutes whose application in this civil case must not be permitted to morph into "a standard-less sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974). In this case, the Magistrate concludes that the SAC "plausibly suggests that Mr. McNally's statement to Congress that Mr. Alperstein's investigation was free from control by USAT was false" but does not suggest *why* this "plausibly allege[s] a § 1590(b) violation." D.E. 218, pp. 45-46. In reality, Plaintiffs have not alleged any relationship in time, causation, and logic between Steve McNally's allegedly false testimony and the enforcement of 18 U.S.C. §§ 1590 and 1591.

Dismissal of Count 14 is further warranted given that 18 U.S.C. §§ 1590(b) and 1591(d) must be read to have a "knowingly*" mens rea* requirement. *Staples v. United States*, 511 U.S. 600, 619 (1994) (holding that where a statute is silent as to the *mens rea* requirement, the appropriate standard is whether the act is done "knowingly"). A

"knowingly" *mens rea* restricts criminality to defendants who are conscious of their wrongdoing, and limits application of 18 U. S.C. §§ 1590(b) and 1591(d) only to "those with the level of culpability usually required to impose criminal liability." *Arthur Andersen LLP*, 544 U.S. at 706. Nothing in the Second Amended Complaint regarding the Congressional testimony demonstrates any relationship to culpability under 18 U. S.C. §§ 1590(b) and 1591(d).

For all of the foregoing reasons, USAT requests that the Court reject the Magistrate's recommendation that Count 14 be permitted to continue against USAT and that it dismiss Count 14 against USAT.

IV. CONCLUSION

For the reasons set forth herein, USAT respectfully objects to the Magistrate's Recommendations with respect to Counts 4, 9, and 14, and asks that those claims be dismissed against USAT.

Dated this 20th day of March, 2019.

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CERTIFICATE OF SERVICE

I certify that on this 20th day of March, 2019, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such to the following:

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